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CITY OF MENLO PARK and DAVE BERTINI

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA – SAN FRANCISCO

MICHAEL ZELENY, an individual

Plaintiff,

VS.

EDMUND G. BROWN, JR., an individual, in  
his official capacity, et al.

## Defendants.

Case No. 17-cv-07357-RS (TSH)

**NOTICE OF MOTION OF DEFENDANTS  
CITY OF MENLO PARK AND DAVE  
BERTINI FOR SUMMARY JUDGMENT  
OR, IN THE ALTERNATIVE, FOR  
PARTIAL SUMMARY JUDGMENT;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF MOTION**

Date: February 25, 2021

Time: 1:30 p.m.

**Dept.: Courtroom 3**

**Judge: Hon. Richard Seeborg**

**Trial Date: None**

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1                   **TO ALL PARTIES AND TO THEIR COUNSEL OF RECORD:**

2                   **PLEASE TAKE NOTICE** that on Thursday, February 25, 2021, at 1:30 p.m. or as soon  
 3 thereafter as the matter may be heard, Defendants CITY OF MENLO PARK ("City") and DAVE  
 4 BERTINI ("Bertini") will move the Court for summary judgment or, in the alternative, for  
 5 partial summary judgment, on the grounds that:

- 6                   A.       The City did not violate Plaintiff's rights by denying him a permit to conduct  
 7                   activities on property that was not within the City's jurisdiction or control;
- 8                   B.       Plaintiff is not entitled to injunctive relief to force the City to issue him a permit to  
 9                   conduct activities on property that is not within the City's jurisdiction or control;
- 10                  C.       Plaintiff was not denied a permit or prohibited from protesting based on the content  
 11                   of his message;
- 12                  D.       Plaintiff's special event permit application was properly denied pursuant Penal Code  
 13                   §§ 26350 and 26400 and because of the significant public safety issues presented by  
 14                   his application;
- 15                  E.       Plaintiff's film permit application was never denied, such that any issue relating  
 16                   thereto is not ripe;
- 17                  F.       The City's special event permit process is valid and plaintiff's challenge to that  
 18                   process is also moot;
- 19                  G.       The City's film permit process is constitutionally appropriate;
- 20                  H.       Defendant Bertini did not violate plaintiff's rights and is entitled to qualified  
 21                   immunity; and
- 22                  I.       Since Defendant Bertini was sued in his official capacity and is no longer a City  
 23                   employee, the injunctive relief sought as to him is moot.

24                   Defendants' motion is based on this notice, the accompanying memorandum of points and  
 25                   authorities, the declarations with exhibits of Dave Bertini, Nicolas A. Flegel and Todd H. Master,  
 26                   the proposed order submitted herewith, the anticipated oral presentation of counsel, the pleadings,  
 records and files herein, including any related papers filed hereafter, and such other and further

1 matters that the court may consider in order to rule on the motion.

2 Date: January 21, 2021

HOWARD ROME MARTIN & RIDLEY LLP

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By: /s/ Robert J. Gundert

Todd H. Master

Robert J. Gundert

Attorneys for Defendants

CITY OF MENLO PARK and

DAVE BERTINI

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## **MEMORANDUM OF POINTS AND AUTHORITIES**

## I. INTRODUCTION

This lawsuit arises out of plaintiff's request for a permit to allow him to openly carry and display military grade firearms and ammunition on the median of a busy city roadway, for an indefinite period of time, as part of a protest of a local business, despite the open carry prohibitions of California Penal Code §§ 26350 and 26400.<sup>1</sup> Plaintiff MICHAEL ZELENY ("Zeleny") sought such a permit from the CITY OF MENLO PARK ("City"). Zeleny contends that under an exemption to these statutory prohibitions he is entitled to authorize himself to openly carry unloaded firearms and ammunition, since he characterized his protest as an "entertainment event." The City denied Zeleny's application for a Special Event Permit ("SEP") because his described activities would violate the Penal Code and presented significant public safety issues.

After this lawsuit was filed the City learned that the median where Zeleny sought to conduct his activities is actually owned by the State of California, not the City. Accordingly, the City had no authority to grant a permit for any activity on the median in the first place. That fact alone derails Zeleny's request for declaratory and injunctive relief, as well as his claim that the City's denial of his SEP application violated his civil rights.

After the City denied his SEP application, Zeleny sought a film permit from the City to stage and film his armed protest on either side of the roadway rather than on the median. The City

<sup>1</sup> Penal Code Section 26350 reads, in pertinent part, as follows:

(a)(1) A person is guilty of openly carrying an unloaded handgun when that person carries upon his or her person an exposed and unloaded handgun outside a vehicle while in or on any of the following: (A) A public place or public street in an incorporated city or city and county. . .

(2) A person is guilty of openly carrying an unloaded handgun when that person carries an exposed and unloaded handgun inside or on a vehicle, whether or not on his or her person, while in or on any of the following: (A) A public place or public street in an incorporated city or city and county. . .

**Penal Code Section 26400** reads, in pertinent part, as follows:

(a) A person is guilty of carrying an unloaded firearm that is not a handgun when that person carries upon his or her person an unloaded firearm that is not a handgun outside a vehicle while in any of the following areas: (1) An incorporated city or city and county. . .

1 responded to the application by asking Zeleny for additional information in order to evaluate the  
 2 proposed activity for public safety and traffic control purposes. Zeleny repeatedly declined to  
 3 provide the requested information and instead filed this suit for declaratory and injunctive relief,  
 4 claiming that the City (and its former Police Commander, defendant DAVE BERTINI ("Bertini")),  
 5 violated his First and Second Amendment rights by not issuing him an SEP or a film permit. In  
 6 addition, Zeleny has sued the State of California, arguing that the State's restriction on the open  
 7 carry of unloaded firearms in public is unconstitutional.

8       The City and Bertini seek summary judgment herein since:

- 9           A. The City did not violate Zeleny's rights by denying him a SEP to conduct activities on  
           10 property not within its control. Similarly, Zeleny is not entitled to injunctive relief to  
           11 force the City to issue him such a permit.
- 12           B. Zeleny was not denied a permit or prohibited from protesting based on the content of  
           13 his message. In fact, he was told repeatedly that he did not even need a permit to protest  
           14 so long as he did so lawfully and peaceably.
- 15           C. Zeleny's SEP application was properly denied pursuant to Penal Code §§ 26350 and  
           16 26400 and because of the significant public safety issues presented by his application.
- 17           D. Zeleny's film permit application was never denied; his as-applied claim is thus not ripe.
- 18           E. The City's SEP application process is valid and plaintiff's challenge to it is also moot.
- 19           F. The City's film permit application process is constitutionally appropriate.
- 20           G. Bertini did not deny Zeleny SEP application. As a City employee, he simply provided  
           21 input for the ultimate decision maker, which was reasonable and appropriate. To the  
           22 extent applicable, entitled to qualified immunity.
- 23           H. Moreover, since Bertini was sued in his official capacity and is no longer a City  
           24 employee, the injunctive relief sought as to him is moot.

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## **II. FACTS**

#### **A. Plaintiff's Past Armed Protests and the California Open Carry Prohibitions**

For approximately six years prior to submitting his special event permit (SEP) application in 2015, Zeleny conducted “at least several dozen” public protests within the City. *See* Zeleny Deposition at 67:1-11 (Exh. A to Declaration of Todd Master (“Master Decl.”)). Starting in 2008, in order to draw attention to his activities, “dramatize his protests” and “amplify his message,” he began displaying firearms while protesting. Second Amended Complaint (“Complaint”) at ¶¶ 46-48 [Document 99]; Zeleny Depo at 52:15-20; 57:7-58:12; 59:20-61:11; 67:1-68:19. During that period, the City allowed him to protest with unloaded firearms. Zeleny Depo at 52:15-53:25; 67:1-68:10; 69:9-71:5; 79:17-80:2; Bertini Depo at 15:5-14, attached as Exh. B to Master Decl.

In 2011, California enacted Penal Code § 26350, which prohibits the open carry of an unloaded handgun in a public place or public street within an incorporated city. At the same time, the California Legislature enacted Penal Code § 26375, which provides that this restriction does not apply to an authorized participant in a motion picture, television, video production or entertainment event, when that person is participating in or rehearsing for such, or while at such a production, event or rehearsal. In 2012, Penal Code § 26400 was enacted. It expanded the open carry prohibition to include unloaded firearms other than handguns. Penal Code § 26405 was also passed. Subpart (r) thereof contains an exemption identical to § 26375, except that it applies to firearms other than handguns.

**B. Zeleny Applies for a Special Event Permit (“SEP”)**

On 7/10/15, Zeleny sent an email to the City with an attached application for an SEP. Zeleny Depo at 95:19-97:1; Exhibit 2. Persons wishing to hold a special event within the City are required to apply for an SEP. Milde Depo at 94:16-25, Exh. 33 Exh. C to Master Decl.); Bertini Depo at 19:21-20:18. Generally speaking, a special event is a community-oriented event that is scheduled to occur on public property, which is not a normal day-to-day occurrence, and for which the applicant does not already have a permit. Bertini Depo at 19:21-21:6, 453:1-454:11, 455:3-457:8. Examples of past special events include run/walk events, concerts, block parties, large

1 birthday parties on public property, car shows, movie nights, small parades and fundraisers.

2 Nicolas Flegel Decl. at 9:5-8.

3       The City's SEP process is found on the City's website, in links to various documents  
 4 referenced on the website, in the FAQs published by the City, in a flow chart, and within the SEP  
 5 application itself. Bertini Depo at 63:23-66:11; Bertini Decl. at 3:7-17.

6       SEP applications are basically questionnaires and checklists that elicit the information  
 7 needed by City staff to understand and evaluate the applicant's proposed event. Milde Depo at  
 8 76:17-79:2; Zeleny Depo at 95:19-97:1; Exhibit 2. The information on the application is initially  
 9 reviewed for completeness and if there are any deficiencies the applicant is contacted and advised  
 10 of the details that need to be modified or included. Milde Depo at 78:19-79:2. Once the application  
 11 is deemed complete enough for review it is circulated to those City departments whose input is  
 12 needed. Milde Depo at 78:19-79:18, 101:15-102:17; Bertini Depo at 26:15-27:1, 47:3-24, 99:3-9,  
 13 105:15-21. Special event proposals vary, but each of the reviewing departments evaluates an  
 14 application to determine whether the activities described comply with department policies, the  
 15 municipal code, state and federal law and whether any particular time, place and manner issues are  
 16 raised, such as those pertaining to public safety, traffic control and hygiene. Bertini Depo at 26:10-  
 17 35:9, 37:11-42:21, 45:7-46:9, 58:21-61:3, 107:4-113:7, Exhibits 33 & 34, 368:23-371:7, 426:18-  
 18 427:8. If an application is denied the City has an appeal process, which starts at the departmental  
 19 level and proceeds to a de novo hearing before the City Manager and thereafter, if necessary, a  
 20 final hearing before the City Council. Bertini Depo at 431:1-434:14.

21       Zeleny's 7/10/15 submittal stated that he intended to begin protesting on 10/1/15 on the  
 22 median of Sand Hill Road and that his protest would last for an "indefinite" period. His protest was  
 23 directed at venture capital firm New Enterprise Associates ("NEA"). Zeleny Depo at 95:19 –  
 24 98:18; 104:17-106:2; 117:18-121:1; Exhibit 2. Zeleny stated he would be equipped with "fully  
 25 operational, exposed and unloaded military grade firearms and loaded ammunition feeding devices  
 26 therefor, including without limitation, a 9mm Para semiautomatic SIG pistol, and a 7.65x51mm  
 NATO semiautomatic LRB M25 rifle and tripod-mounted belt-fed Browning M1919a4. . ." Zeleny

1 Depo at 105:22-110:10; Exh. 2. An image of the belt-fed Browning M1919a4 that Zeleny intended  
 2 to display on the center median (albeit with a different tripod) can be seen at Exhibits 3 and 5 of  
 3 Zeleny's deposition. Zeleny Depo at 112:10 – 24; 128:4-129:16; Exhs. 3 & 5.

4 Zeleny's proposed event was also to include a 55-inch portable media display showing  
 5 videos "featuring explicit representations of sexual violence." He included a web link to a "sample  
 6 image," which is an animated depiction of an NEA client raping his minor daughter while NEA  
 7 representatives watched approvingly. The still version of the moving image that Zeleny planned to  
 8 display is attached as part of Exhibit 4 to his deposition transcript. Zeleny Depo at 113:20-114:8;  
 9 115:17-117:5; Exhibit 4.

10 Zeleny intended to sleep in his truck on the median until the cessation of his protest, the end  
 11 date of which would be whenever NEA submitted to his demands. Zeleny Depo at 104:17-107:18;  
 12 Exhibit 2. His application and accompanying email also indicated that he intended to use amplified  
 13 sound, a portable toilet, and temporary lighting (spotlights focusing on his display) on the median.  
 14 Zeleny Depo at 121:15-18; 123:5-23; Exhibit 2. Despite the foregoing, Zeleny's application stated  
 15 that he did not need a traffic control plan or crowd control since "no stopping [is] allowed on the  
 16 Sand Hill roadside." However, he later stated that his activities would include passing out handouts  
 17 and souvenirs and engaging in discussion with those passing by. Zeleny Depo at 141:21-142:7;  
 18 Exhibit 9 (third paragraph of 5/27/16 email).

19 Zeleny's submittal curiously stated that he "assumes full personal responsibility for the  
 20 lawful defense of the site." Exhibit 2 to Zeleny Depo (2nd page of application). He intended to  
 21 hire an armed guard "for nighttime protection." Zeleny Depo at 106:9-107:18; 121:19-122:3. He  
 22 also disclosed in subsequent e-mails and in deposition testimony that one reason he wished to have  
 23 guns and ammunition on site was because he had received death threats from persons "sponsored  
 24 and supported by NEA" and that "a gun without ammunition is useless." Zeleny Depo at 59:20-  
 25 61:11; 131:17-133:7; Exhibit 7 (April 15, 2016 e-mail, pp. 1-2). Zeleny was thus preparing for the  
 26 possibility that he would need to defend himself on the Sand Hill Road median with his "fully  
 operational . . . military grade firearms and loaded ammunition feeding devices therefor."

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1       After an exchange of e-mails with Zeleny, the City denied the SEP application via letter  
 2 sent by City Attorney William L. McClure. Zeleny Depo at 129: 17-130:16; Exhibit 6. The  
 3 application was denied for various reasons, including that it was incomplete, proposed carrying  
 4 firearms openly in violation of state law, and created significant public safety concerns. Id.

5       On 4/15/16, Zeleny submitted what he characterized as an appeal of the denial of his SEP  
 6 application. Zeleny Depo at 132:15-133:7; 135:24-137:1; Exhibit 7. The e-mail was accompanied  
 7 by a revised SEP Application dated 6/3/15 (i.e. pre-dating his initial application). The revised  
 8 application modified the initial one in that it a) stated that the event would no longer last for an  
 9 indefinite amount of time but would be limited to the month of October 2015 (even though the  
 10 accompanying e-mail indicated otherwise) and b) that instead of unloaded firearms plaintiff would  
 11 have “fully operational, exposed and **loaded** firearms.” (Emphasis added.) Id.

12       The City treated the submittal as a revised application rather than an appeal, since it  
 13 “outline[d] several modifications and provide[d] additional information to supplement [the]  
 14 original application.” Zeleny Depo at 140:10-24; Exhibit 8. The City denied Zeleny’s revised  
 15 application. Traffic safety issues were cited and additional information was requested in that  
 16 regard. The City also stated that plaintiff’s proposal to carry loaded or unloaded weapons was  
 17 illegal. Id.

18       Thereafter, Zeleny and the City engaged in further written communications and proceeded  
 19 through the City’s appeal process. In a 5/27/16 e-mail he stated that if his application were to be  
 20 approved he would be carrying unloaded rather than loaded firearms. He also stated that he would  
 21 be interacting with those passing by, distributing flyers and souvenirs and providing people with an  
 22 opportunity “to engage me in real-time discussion, broadcast via a live Internet linkage.” He did  
 23 not specify whether this would involve motorists stopping in the middle of Sand Hill Road, driving  
 24 up onto the median or something else. In addition, he expressed disagreement with the City’s view  
 25 concerning the exemptions to the statutory open carry prohibitions. Zeleny Depo at 141:19-142:17,  
 26 (Exh. 9), 145:8-147:4 (Exh. 10), 147:8-148:24 (Exhs. 11 and 12).

On 8/11/16, City Manager Alex McIntyre conducted a de novo hearing on Zeleny’s appeal

1 of the City's denial of his SEP application. Testimony and exhibits were presented and the hearing  
 2 was recorded by audiotape. Plaintiff was represented by counsel as was the hearing officer. Zeleny  
 3 Depo at 152:22-155:19; McIntyre Depo at 36:8-37:3, 40:17-43:3 43:13-15. The audiotape of the  
 4 hearing can be accessed at <https://spaces.hightail.com/space/k7r5s5Uj6Z>. An unofficial transcript is  
 5 attached to the Declaration of Todd H. Master for the court's convenience.

6 Following the hearing, the City Manager issued a letter dated 9/12/16, denying Zeleny's  
 7 SEP application. McIntyre Depo at 78:9-79:11, Exh. 154; Zeleny Depo at 161:14-164:20, Exh. 17.  
 8 City Manager McIntyre stated that the application did not describe a special event, presented public  
 9 safety concerns, that the open carry of firearms would violate state law, and that the use of lights,  
 monitor and a display had the potential to distract drivers and/or to impair a motorist's vision.  
 10 Additionally, the letter stated that driving a vehicle on the median would be a violation of Vehicle  
 11 Code § 21651. McIntyre Depo at 78:9-79:11, Exh. 154; Zeleny Depo at 161:14-164:1, Exh. 17.  
 12 McIntyre also noted that the subject median is "adjacent to the entrances and exits of Interstate  
 13 280, making the location unsafe and dangerous to pedestrians, cyclists and vehicles and Zeleny had  
 14 not submitted a specific sit plan addressing these concerns." Id.

15 Zeleny then appealed to the City Council, which also held a hearing with live testimony and  
 16 presentations. Zeleny Depo at 168:5-170:7. The City Council upheld the City Manager's denial of  
 17 Zeleny's SEP application and Zeleny was so advised. Zeleny Depo at 174:16-175:9, Exh. 18;  
 18 McIntyre Depo at 162:14-163:4, Exh. 162; City Council Hearing Transcript at 42:9:44:19 (Exh. G  
 19 to Master Decl.). The City Councilmembers repeatedly stated that they respected the protest Zeleny  
 20 wished to undertake and advised him numerous times that he did not need a permit to protest, so  
 21 long as he does so lawfully and peaceably. CC Hrg. Transcript at 23:18-25:4, 34:4-35,10, 39:19-  
 22 40:21, 41:4-42:8. They also expressed concerns about his open display of weapons on the median,  
 23 which could easily frighten the public and result in traffic accidents. Id. and 18:12-13. The video of  
 24 the City Council can be accessed at <https://spaces.hightail.com/space/dSShowqqgY>.

25 **C. Zeleny Applies for a Film Permit**

26 Zeleny responded to the City Council's denial of his SEP application by requesting a film

1 permit. He asked that the City “reconsider [his] special event permit application as requesting a  
 2 film permit.” Flegel Decl. at 4:4-18, Exhs. D & E. He was advised that the process for a film  
 3 permit is different from an SEP and was asked to complete an encroachment permit application,  
 4 which is what the City uses for film projects and other activities within a public right-of-way. Id.

5 Zeleny submitted an e-mail with a film permit application on 10/6/17. The description of  
 6 his proposed activities was similar to his initial SEP application, in that he intended to carry and  
 7 display firearms. However, there were some changes: Zeleny planned to conduct his activities from  
 8 10/30/17 through 12/29/17 (per his application) from 8 a.m. to 6 p.m. every weekday with  
 9 cameras placed on each side of Sand Hill Road, focusing on public reactions with footage streamed  
 10 live on the internet. Zeleny Depo at 177:12-180:21; Exhibit 21; Flegel Decl. at 4:18-21, Exh. F.

11 In an 11/6/17 email, the City asked Zeleny various questions about his application. Zeleny  
 12 sent a response on 11/9/17 & 11/13/17. Flegel Decl. at 4:22-5:9, Exhs. G, H & I; Zeleny Depo at  
 13 198:1-199:1; Exhs. 23 & 24. In his 11/13/17 response Zeleny asked the City to agree that he would  
 14 be legally within his rights to openly carry firearms in connection with his filming. Id.

15 On 11/22/17 Assistant City Attorney Nicolas Flegel replied since Zeleny had raised that  
 16 legal issue. Mr. Flegel replied that “[O]nce you obtain a film permit from the City, you will be  
 17 allowed (by the City) to possess an unloaded gun(s) to the extent you are using it as part of the film  
 18 production.” Mr. Flegel stated that the “City is willing to work with you in coming to agreeable  
 19 terms for the filming to take place, so please do not take the approach that a denial of your  
 20 application is in any way predetermined. However, we need additional information from you so  
 21 that the City is comfortable in its understanding of what you are proposing and so the City can be  
 22 satisfied that it will be done in a way that is safe and acceptable.” Flegel Decl. at 5:9-17, Exh. J.

23 Zeleny was asked to be specific about where he planned to place his items so that the City  
 24 could better analyze for safety and traffic control purposes, the guns to be used and how they were  
 25 to be used, and the directions they would face, since brandishing weapons at those passing by to  
 26 film their reactions would not be acceptable. Mr. Flegel also asked Zeleny about his intentions of  
 having “loaded ammunition feeding devices with you.” Zeleny was asked to confirm the guns

would be used for film production purposes, and whether he intended to use fake props or live ammunition. If the latter, Mr. Flegel remarked that “it is unclear why live ammunition would in any way be necessary for your film production.” Citing the many mass shootings around the country, he stated that “I think you can understand the concern regarding this issue.” He invited Zeleny to provide legal authority to support his position that the open carry exemptions allowed the use of live ammunition for a film project. Flegel Decl. at 5:18-4:6, Exh. J. In closing Mr. Flegel emphasized that the City was working with plaintiff in good faith so that he could proceed with his film production but they needed his cooperation because of his application raised numerous safety considerations. Id.

On 12/7/17, Mr. Flegel again wrote Zeleny since he had not responded to the requests for additional information. Flegel Decl. at 6:7-17, Exhs. K & L. Plaintiff sent two letters thereafter, neither of which responded to the questions he had been asked. Flegel Decl. at 6:18-7:2, Exhs. M & N.

Mr. Flegel again wrote on 12/21/17, renewing the City’s request for information and asking if plaintiff still wanted a film permit. Flegel Decl. at 7:3-8, Exh. O. Zeleny responded without providing the requested information whereupon Mr. Flegel wrote one last time on 12/22/17. Flegel Decl. at 7:20-8:21, Exhs. P & Q. Plaintiff’s response was to file this lawsuit.

### III. LEGAL ARGUMENT

#### A. The City Had No Authority to Issue the Requested SEP Permit

In each count of his Complaint, Zeleny claims that he was wrongly denied the SEP that he sought from the City. While it surely would have been better if those processing the SEP application had known it at the time, it was not until after this lawsuit was filed that the City discovered the median in question is owned by the State of California and thus not subject to the City’s jurisdiction. The State’s ownership and control of the median was discovered by Assistant City Attorney Nicolas A. Flegel while handling another lawsuit involving the City. Flegel Decl. at 2:12-4:2, Exhs. A-C. Zeleny and his counsel were informed of this fact through the City’s discovery responses. Master Decl. at 4:23-5:1; Flegel Decl. at 2:12-4:2. The fact that the State owns and

1 controls the median effectively dispenses with Zeleny's claim that the City violated his rights by  
 2 not issuing the requested SEP. Since the City had no authority to issue a permit to anyone to engage  
 3 in activities on the median, it stands to reason that it did not violate Zeleny's rights by declining to  
 4 issue such an improper permit and cannot be ordered to issue such a permit for State property.

5 California Streets & Highways Code § 90 provides that the State of California, through its  
 6 Department of Transportation, has "full possession and control of all state highways and all  
 7 property and rights in property acquired for state highway purposes." A municipality has no control  
 8 over property that is dedicated to state highway purposes except as may be granted by the state. See  
 9 *Southern California Roads Co. v. McGuire* (1934) 2 Cal. 2d 115.

10 Long before this controversy arose the City and the State entered into a maintenance  
 11 agreement that included the median in question. Nothing in that agreement gives the City authority  
 12 to issue the SEP demanded by Zeleny. *See Flegel Decl.* at 2:12-4:2. Because the City had (and has)  
 13 no authority to issue such a permit, there is no longer a "live controversy" relating to the non-  
 14 issuance of the SEP or the request for an injunction to compel the issuance of such a permit. As  
 15 stated in *Doe v. Madison School District No. 321*, 177 F.3d 789, 797-98 (9th Cir. 1999), "If an  
 16 action or a claim loses its character as a live controversy, then the action or claim becomes 'moot,'  
 17 and [the court] lacks jurisdiction to resolve the underlying dispute."

18 Plaintiff's rights were not violated by non-issuance of the SEP. He was not and is not  
 19 entitled to an SEP from the City for his proposed activities on the Sand Hill Road median.

20 **B. Plaintiff Was Not Prohibited from Protesting on Obscenity Grounds**

21 The first count of the Complaint is asserted against the City and Bertini, alleging that  
 22 they prohibited Zeleny from engaging in his protests by threatening to prosecute him under Penal  
 23 Code § 313.1 if he were to display videos featuring explicit representations of sexual violence.  
 24 Penal Code § 313.1 relates to the exhibition of harmful matter to a minor. When asked by  
 25 interrogatory to state all facts supporting the allegations of the first count of his initially filed  
 26 complaint (which are identical to the allegations in the Second Amended Complaint), Zeleny  
 responded, in pertinent part: "Defendant [City], through Bertini, has also informed Plaintiff that if

1 Plaintiff displays a non-obscene piece of artwork in connection with his protests, Plaintiff will be  
 2 arrested for and/or charged with obscenity as to minors.” Master Decl. at 3:11-22.

3 In deposition, Zeleny testified that the only occasion on which he and Bertini were in  
 4 personal contact was at the appeal hearings before the City Manager and the City Council. Zeleny  
 5 Depo at 172:12-174:15. Other than those two occasions the only way that he communicated with  
 6 the City about his SEP application was through email. Id. Consequently, those were the only  
 7 occasions on which Bertini could have threatened to arrest Zeleny. He did not so threaten Zeleny,  
 8 however. Two things should be noted about Bertini’s testimony at those hearings.

9 First, Bertini did not state that Zeleny would be arrested or charged if he were to display the  
 10 image in question. Rather, Bertini stated that “*if* Mr. Zeleny were to in fact display this [image]  
 11 openly, *if* any children were present, he *may* be in violation of 313.1 of the Penal Code, displaying  
 12 harmful material where children can view it.” [Italics added] City Manager Hrg. Audio; Pp. 6-10 of  
 13 transcript. On cross-examination, Bertini explained that “*if* [the image] were to be displayed in  
 14 public *and* we had a complaining parent of a minor who was exposed to it, 313.1 is a section that  
 15 *could* be used to make an arrest or prosecution.” [Italics added.] Id.

16 Bertini was also asked about this testimony in deposition. He testified that he personally  
 17 does not find the image patently offensive but a judgment would have to be made by an officer  
 18 and/or the District Attorney whether display of the image would violate Penal Code § 313.1 if a  
 19 complaint were made. Bertini Depo at 135:2-144:1, Exhs. 37 & 38, 556:20-560:2. Exh. 38. Such  
 20 testimony was not made as a threat but simply an offered opinion that the parent of a minor child  
 21 may take offense at Zeleny’s “explicit representations of sexual violence” and complain to the City,  
 22 at which point a determination would have to be made as to whether such material constituted  
 23 “harmful matter” within the meaning of Penal Code §§ 313 and 313.1.

24 Penal Code § 313.1 makes it a crime to knowingly exhibit “any harmful matter” to a minor.  
 25 “Harmful matter” is defined in Penal Code § 313 as “matter, taken as a whole, which to the average  
 26 person, applying contemporary statewide standards, appeals to the prurient interest, and is matter  
 which, taken as a whole, depicts or describes in a patently offensive way sexual conduct and which,

1 taken as a whole, lacks serious literary, artistic, political, or scientific value for minors.” As the  
 2 court can see, a determination in this regard can be a judgment call. The ultimate determination  
 3 turns on various questions of fact, the parameters of which are not easy to delineate.

4 Next, contrary to Zeleny’s contention, he was not “prohibited” by Bertini or the City from  
 5 protesting or using the image as part of his protest. The proposed display of the image was not a  
 6 basis for denying plaintiff an SEP. Neither the City Manager nor the City Council referenced the  
 7 image or Section 313.1 in their decisions. Thus, Zeleny’s claim that statements made by Bertini at  
 8 the City Manager hearing “prohibited” him from protesting is simply not true.

9           **C.     The City Had Valid Time, Place and Manner Reasons for Denying an SEP**

10           One of the primary concerns raised by the City in its denial of the SEP application was the  
 11 proposed location, i.e. the median on a busy arterial roadway. Zeleny appears to assume that the  
 12 median is a public forum because it is publicly owned. But, as stated in the plurality decision of  
 13 *United States v. Kokinda*, 497 U.S. 720, 725 (1990), “The Government’s ownership of property  
 14 does not automatically open that property to the public.” *United States Postal Service v. Council of*  
*Greenburgh Civic Assns.*, 453 U.S. 114, 129 (1981).” A sidewalk is typically regarded as a classic  
 15 public forum. Yet in *Kokinda* the Court noted that not every sidewalk is a public forum. *Kokinda*,  
 16 *supra* at 728. The City submits that this median is not a public forum either.

17           As the court stated in *Center for Bio-Ethical Reform, Inc. v. City & County of Honolulu*, 455  
 18 F.3d 958, 966 (9th Cir. 2006), “For purposes of First Amendment analysis, public property fits into  
 19 one of three main categories: (1) a public forum, (2) a designated public forum, or (3) a nonpublic  
 20 forum. *Preminger*, 422 F.3d at 823. Any public property that is neither a public nor a designated  
 21 public forum is considered a nonpublic forum. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*,  
 22 196 F.3d 958, 965 (9th Cir. 1999).”

23           The court elaborated on the first category, stating that “Public fora are places ‘that have  
 24 traditionally been devoted to expressive activity,’ such as public parks and sidewalks. *Preminger v.  
 25 Principi*, 422 F.3d 815, 823 (9th Cir. 2005)].” As the declarations of Nicolas A. Flegel and Dave

1 Bertini indicate, this median has no history or tradition of use as a public forum. Flegel Decl. at  
 2 8:23-9:9; Bertini Decl. at 2:9-3:2.

3 As for the second category, the State has not designated medians as public fora. Rather than  
 4 designating medians as public fora, the State *restricts* activities on medians, as indicated by Vehicle  
 5 Code §§ 21651 (prohibiting driving on a median) and 21719 (which even restricts tow truck drivers  
 6 from using a median in an emergency situation unless specific conditions are met).

7 That leaves the third category – a nonpublic forum. When a court evaluates the regulation of  
 8 expressive activity in a non-public forum, the standard is reasonableness. *Kokinda, supra* at 727.  
 9 See also *Center for Bio-Ethical Reform, Inc., supra* at 966, where the court said that “[a]reas not  
 10 traditionally or explicitly opened to expressive activity are deemed nonpublic fora, which are  
 11 subject to a more lenient standard of scrutiny — restrictions on nonpublic fora need only be  
 12 reasonable and viewpoint neutral. Id. Examples of nonpublic fora include airport terminals, *Lee*,  
 13 505 U.S. at 679, highway overpass fences, *Brown v. Cal. Dep. of Transp.*, 321 F.3d 1217, 1222 (9th  
 14 Cir. 2003), and interstate rest stop areas (including perimeter walkways), *see Jacobsen v. Bonine*,  
 15 123 F.3d 1272, 1273-74 (9th Cir. 1997).”

16 Accordingly, any regulation of expressive activity on the subject median should be analyzed  
 17 under a reasonableness standard. Under such a test, “‘The Government’s decision to restrict access  
 18 to a nonpublic forum need only be *reasonable*; it need not be the most reasonable or the only  
 19 reasonable limitation.’ 473 U.S. at 808.” *Kokinda, supra* at 730, quoting *Cornelius v. NAACP Legal*  
*Defense & Educational Fund, Inc.*, 473 U.S. 788 (1985). The open display of military grade  
 20 firearms and ammunition on the center median of busy Sand Hill Road would undoubtedly create  
 21 significant confusion, fear, alarm, disruption and delay for motorists and others. It is submitted that  
 22 the denial of a permit to conduct such activity in such a context satisfies the reasonableness  
 23 standard as a matter of law.

24 Even if, for the sake of argument, the median were to be deemed a public forum, a public  
 25 entity may regulate expressive activities in a content-neutral manner on appropriate time,  
 26 place and manner grounds in a public forum. See *Ward v. Rock Against Racism* 491 U.S. 791

1 (1989). A public entity may impose reasonable time, place, and manner restrictions on speech in a  
 2 public forum if the restrictions are (1) content neutral; (2) narrowly tailored to serve a significant  
 3 governmental interest; and (3) leave open ample alternative channels of communication." *Ward v.*  
 4 *Rock Against Racism* 491 U.S. 781, 791 (1989); *Edwards v. City of Coeur D'Alene*, 262 F.3d 856,  
 5 862 (9th Cir. 2001); and *Int'l Soc'y for Krishna Consciousness of Cal., Inc. v. City of Los Angeles*,  
 6 764 F.3d 1044, 1049 (9th Cir. 2014). Those criteria are satisfied here.

7           ***The City's Denial of Plaintiff's SEP Application Was Not Based on Content***

8           With regard to the first question of whether the City's restrictions were content-neutral, in  
 9 *Ward, supra*, the Court stated that "Government regulation of expressive activity is content neutral  
 10 so long as it is 'justified without reference to the content of the regulated speech.' [Citations.]"  
 11 *Ward, supra* at pp. 791-792. This test is clearly met here since the City's denial of plaintiff's SEP  
 12 application was based on California statutory law prohibiting the open carry of firearms and on  
 13 stated public safety grounds, not the content of Zeleny's message.

14           ***The City Had Legitimate Interests in Enforcing State Law and in Public Safety***

15           Turning to the second, two-part *Ward* requirement (i.e. that there be a narrow tailoring of  
 16 a significant government interest), the first task is to identify the governmental interest. Here, the  
 17 City had two interests: compliance with state law and public safety.

18           There can be no doubt that a municipality has a significant interest in upholding and  
 19 enforcing state laws. See, for example, California Constitution, Article XI, § 7, which states that "A  
 20 county or city may make and enforce within its limits all local, police, sanitary, and other  
 21 ordinances and regulations not in conflict with general laws." Cities may enact their own local laws,  
 22 but those laws must not be inconsistent with the laws of the State.

23           Cities also have a significant interest in public safety. *See McCullen v. Coakley*, 573 U.S.  
 24 464, 466 (2014) (Massachusetts' "legitimate interests in maintaining public safety on streets and  
 25 sidewalks"); *United States v. Torres*, 911. F.3d 1253, 1263-1264 (9th Cir. 2016) ("the important  
 26 government interest of ensuring the safety of both the public and its police officers."); *Gallinger v.*  
*Beccerra*, 898 F.3d 1012, 1021 (9th Cir. 2018) (public safety). Similarly, the right of a municipality

1 to ensure the safe and undisturbed movement of traffic throughout its jurisdiction has been  
 2 recognized for decades. *See Cox v. New Hampshire*, 312 U.S. 569, 574-575 (1941).

3 The City's significant, legitimate law enforcement and public safety interests were called to  
 4 the fore in this case. The City Councilmembers repeatedly acknowledged their responsibility to  
 5 keep members of the public safe and free from undue fear and panic. It was quite reasonable to  
 6 expect that people coming upon this scene and seeing a heavily armed individual would not know  
 7 whether his guns were loaded, nor would they be able to discern his intentions. All of this would  
 8 undoubtedly cause fear, as Zeleny himself acknowledged in deposition. Zeleny Depo at 58:13-  
 9 59:19. Fearful people panic and fearful drivers, perceiving a threat may drive erratically to avoid the  
 10 perceived danger and may even try to defend themselves with their own firearms, vehicles or  
 11 otherwise. The activities described by plaintiff presented a ***significant*** threat to public safety.

12 Adding to the City's concerns was the fact that Zeleny anticipated that he might need to ***use***  
 13 his weapons. He testified about death threats he had received, and that he needed to have  
 14 ammunition in case he would have to use his guns, stating that "a gun without ammunition is  
 15 useless." Zeleny Depo at 57:7-58:12; 59:20-61:11. If he were ever to use his guns in self-defense on  
 16 the median of Sand Hill Road, casualties could be expected. Furthermore, the threat to public safety  
 17 would be present 24/7 while Zeleny occupied the median. He planned to sleep in his truck on the  
 18 median and intended to hire an **armed guard** to protect his weapons while he slept. Zeleny Depo at  
 19 106:9-107:18; 121:19-122:3. This shows that he anticipated the potential for danger at all hours.

20 In addition to these legitimate concerns, there were also Vehicle Code issues. One concern  
 21 was that Zeleny's large, spotlighted displays and weapons in the middle of a busy arterial would  
 22 distract or obscure the vision of drivers as they motored along at high speeds. Additionally, Vehicle  
 23 Code § 21651(a)(1) prohibits driving over, upon or across the dividing section (i.e. median) of a  
 24 divided roadway and Zeleny planned to drive his truck onto the median. Zeleny Depo at 108:2-17.

25 Zeleny's SEP application presented significant legitimate legal and public safety concerns.

26 ***The City's Denial Was as Narrowly Tailored as it Could Be***

1           As to the question of whether a restriction is "narrowly tailored," the Supreme Court has  
 2 stated that while "a regulation of the time, place, or manner of protected speech must be narrowly  
 3 tailored to serve the government's legitimate, content-neutral interests[,] it need not be the least  
 4 restrictive or least intrusive means of doing so." *Ward v. Rock Against Racism*, 491 U.S. 781, 798  
 5 (1989). A content-neutral regulation will be deemed narrowly tailored "'so long as the. . .regulation  
 6 promotes a substantial government interest that would be achieved less effectively absent the  
 7 regulation.'" (*Ward, supra* at p. 799, quoting *United States v. Albertini*, 472 U.S. 675, 689.)

8           The Court has also stated that "the regulation will not be invalid simply because a court  
 9 concludes that the government's interest could be adequately served by some less-speech-restrictive  
 10 alternative." Id. at 800. Even a complete ban can be found to be narrowly tailored if "it targets and  
 11 eliminates no more than the exact source of the 'evil' it seeks to remedy." *Frisby v. Schultz*, 487 U.S.  
 12 474, 486 (1988).

13           The denial of Zeleny's request was as narrowly tailored as it could be given his insistence  
 14 on openly carrying firearms and ammunition in an illegal and dangerous manner on the median of a  
 15 busy arterial roadway. Zeleny Depo at 165:10-166:1.

16           ***Alternative Channels of Communication Were Available to Plaintiff***

17           Finally, the City left open ample alternative channels of communication for Zeleny. He had  
 18 been able to protest on the sidewalk in the past and the City repeatedly informed him that he did not  
 19 need a permit to conduct lawful protests within the City so long as he did so legally and peaceably.  
 20 CC Hrg. Transcript, *supra*; Zeleny Depo at 163:13-164:22. The City even suggested that he apply  
 21 for a film permit so that he may possibly fit within the exceptions to the State's open carry ban.  
 22 Zeleny Depo at 129:18-130:23, Exh. 6. In fact, following the denial of his SEP application, the City  
 23 was in the process of evaluating Zeleny's film permit application when he simply declined to  
 24 respond to the City's inquiries and filed suit instead.

25           **D. The Open Carry Exemptions Were Not Applicable to Plaintiff's SEP Application**

26           In the second and third counts of the Complaint Zeleny alleges that the City misinterpreted

1 the exemptions to Penal Code §§ 26350 and 26400. The City submits that the issue of how to  
 2 interpret the open carry exemptions is irrelevant to the SEP application, since a) the City could not  
 3 have issued the SEP in the first place and b) the City denied Zeleny's SEP application on valid time,  
 4 place and manner grounds.

5 The issue is also not relevant with regard to the film permit application since Zeleny never  
 6 completed that process. Assistant City Attorney Flegel informed Zeleny that if a film permit were  
 7 issued he would be allowed to openly carry his firearms for his film project, but in order to issue  
 8 such a permit the City needed information so the City could evaluate the public safety and traffic  
 9 control issues raised by his application. Plaintiff was asked various questions, such as why he  
 10 needed live ammunition for a film project and he was asked for legal authority to support his  
 11 apparent claim that the exemptions to the open carry prohibitions would permit him to use  
 12 ammunition for a film. He declined to respond and left the issue hanging and unresolved. Despite  
 13 these circumstances, the issue is addressed below.

14 Each of the exemptions to the open carry ban reads virtually the same. Penal Code §§ 26375  
 15 and 26405(r) exempt an "authorized participant" in a motion picture, television or video production,  
 16 or an entertainment event from the open carry prohibitions of Penal Code §§ 26350 and 26400 while  
 17 the authorized participant is lawfully using a firearm "as part of that production or event, as part of  
 18 rehearsing or practicing for participation in that production or event, or while the participant . . . is  
 19 at that production or event, or rehearsal or practice for that production or event." Zeleny interprets  
 20 these exemptions as allowing him to openly carry his unloaded firearms in public so long as he  
 21 authorizes himself as a participant in his own one-person film event. Zeleny Depo at 165:10-  
 22 167:12. The City interprets the exemptions as requiring its authorization since the activities would  
 23 be occurring on public property. Bertini Depo at 24:7-20; Flegel Decl. at 5:9-10, 6:11-12, Exhs. J &  
 24 L. If one could simply authorize oneself then the exemption loses its meaning and effectively  
 25 swallows the prohibition. Any person with a GoPro or a cell phone capable of recording video  
 26 images could simply authorize himself or herself to carry an unloaded firearm while taking selfies  
 and calling them "entertainment events." It is doubtful the California Legislature had that in mind

1 when it enacted the exemptions.

2 In addition, Zeleny's application of the term "entertainment event" to his protest is  
 3 questionable. There is a meaningful distinction between an entertainment event and a protest.  
 4 Zeleny claims that by his protest he wished to bring to light certain criminal and immoral conduct.  
 5 According to Zeleny virtually anything could be considered an "entertainment event," including the  
 6 most solemn speech or eulogy, even if that was not its purpose.

7 Even if one could legally authorize oneself to carry an unloaded firearm in virtually any  
 8 situation while calling it entertainment, Zeleny also wanted to carry **ammunition** for his guns,  
 9 which presents a much different situation than one where unloaded firearms are used as props in a  
 10 movie, television show or some other form of entertainment.

11 Zeleny has designated Michael Tristano as one of his firearm experts in this litigation. In his  
 12 Rule 26 declaration (Exh. "H" to Master Decl.), Tristano declares that he is an armorer, and "on-  
 13 camera weapons expert" for the movie and television industries. He trains actors, actresses, extras,  
 14 and stunt people "for proper and safe use of blank-firing firearms on set, [and that his] company  
 15 also rents and provides non-firing replica and rubber guns." He discusses his experience with the  
 16 use of such blank-firing guns, non-firing replicas and rubber guns in the entertainment industry.  
 17 Nowhere does he indicate that live ammunition is used.

18 What Zeleny was proposing was a protest. He wanted to carry firearms to attract attention  
 19 not to entertain, and he wanted to have live ammunition for self-defense. That is a much different  
 20 situation than the use of firearms, without live ammunition, for entertainment purposes.

21 Finally, Zeleny stated in his SEP submittals that he would be occupying the median on a  
 22 24/7 basis. It is fair to say that when Zeleny would be asleep in his truck on the center median, there  
 23 would be no "entertainment event" occurring. Thus, even under his own view of the exemptions his  
 24 weapons would be onsite illegally at such times, further justifying denial of his SEP application.

25 **E. Plaintiff's As-Applied Film Permit Claim is Not Ripe**

26 Zeleny never completed the application process. After he submitted his film permit  
 application the City asked him several questions so that it could better understand and evaluate the

1 traffic and safety issues raised by the description of his proposed film event. He responded partially,  
 2 but when he was asked for more information about where he specifically planned to place his  
 3 equipment, the guns to be used, how they were to be used and why he would need live ammunition  
 4 for a film project his response was to file this lawsuit. Zeleny's failure to complete the film permit  
 5 application process precludes his claim that the City violated his rights by not issuing him a film  
 6 permit. His claim is not ripe since he did not complete the process and thus never obtained a  
 7 decision from the City. *See Manufactured Home Communities, Inc. v. City of San Jose*, 420 F.3d  
 8 1022 (9th Cir. 2005); *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957 (9th Cir.  
 9 2011); and *Thomas v. Anchorage Equal Rights Commission*, 220 F.3d 1134 (9th Cir. 2000).

10 Referring to the ripeness doctrine in a manner that applies here, the Supreme Court has  
 11 stated that "its basic rationale is to prevent the courts, through avoidance of premature adjudication,  
 12 from entangling themselves in abstract disagreements over administrative policies, and also to  
 13 protect the agencies from judicial interference until an administrative decision has been formalized  
 14 and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S.  
 15 136, 148-149 (1967), abrogated on other grounds by *Califano v. Sanders*, 430 U.S. 99 (1977).

16 In addition, by failing to respond to the City's inquiries the record is not complete. How  
 17 Zeleny would have responded and what the City would have done at that point is speculative and  
 18 therefore not justiciable. *Id. at 148.*

19 **F. The City's SEP Process is Valid and the Facial Challenge to It is Moot**

20 The Complaint's third count asserts that the City's SEP process is vague and lacks definite  
 21 standards. When a vagueness challenge is raised, the court should first determine if the challenged  
 22 process reaches a substantial amount of constitutional activity. If it does not, the court should  
 23 uphold the challenge "only if the enactment is impermissibly vague in all of its applications." *Hotel*  
 24 & *Motel Ass'n of Oakland v. City of Oakland*, 344 F.3d 959, 971 (9th Cir. 2003).

25 The City's SEP process does not substantially reach or regulate constitutional activity.  
 26 Permits have typically been issued for events such as fun runs/walks, block parties, car shows,  
 concerts, movie nights and large birthday parties. Flegel Decl. at 9:5-8. The City's website, FAQ

1 document and Notice to Special Event Permit Applicants all describe special events as playing “an  
 2 important role in building community and creating vibrancy within the City.” Exhs. C, E & G to  
 3 Bertini Decl.

4 The SEP application (Exh. D to Bertini Decl.) is focused on logistics, safety, compliance  
 5 with the Noise Ordinance and similar considerations. The SEP FAQs (Exh. E to Bertini Decl.)  
 6 address the question of “What would cause a permit to get denied?” The factors listed involve “size  
 7 (number of people), scale, location, route to be closed, community impact, impact on City services,  
 8 past practices/experiences with issued permits, intended use, non-payment of fees, poor articulation  
 9 of event as reflected in the application and site map, etc.”

10 It is apparent from these documents that describe the City’s SEP policy (Bertini Depo at  
 11 63:23-66:2) that the SEP process was designed for community-related activities of a social and/or  
 12 recreational nature. Consistent with that, plaintiff was told repeatedly that the SEP process did not  
 13 apply to his proposed protest and that he did not need a permit to protest. Accordingly, it is  
 14 submitted that the City’s SEP process does not substantially regulate free speech and that plaintiff  
 15 must therefore show that the City’s permit issuing process “is impermissibly vague in all of its  
 16 applications.” But that is not the case. These very same documents show that the SEP process  
 17 validly regulates the types of activities for which it was designed. Just because plaintiff wants to  
 18 crash the party and shoehorn his protest into this process is no reason to apply First Amendment  
 19 requirements where they are not applicable.

20 In addition, Zeleny’s facial challenge to the City’s SEP process “does not present a live  
 21 controversy for adjudication.” *Doe v. Madison School District No. 321*, 177 F.3d 789, 797-98 (9th  
 22 Cir. 1999). He sought a special event permit that the City had no authority to grant and there is  
 23 nothing in his Complaint that states he intends to seek another SEP. Accordingly, the issues  
 24 regarding the City’s SEP process are academic at best.

25 **G. The City’s Film Permit Process is Constitutionally Appropriate**

26 The City’s film permit process is straightforward and content-neutral. It is found in Chapter  
 13.18 (“Use of Public Rights-of-Way”) of the City’s Municipal Code. A copy of that chapter is

1 attached to the Flegel Declaration as Exhibit R. The entire chapter is content-neutral and applies to  
 2 any type of work “in or upon any real property in which the City has an interest. . .”

3       Section 13.18.110 (“Regulations”) states that those who obtain an encroachment permit  
 4 must conduct operations “in compliance with all laws and practices affecting such facilities. This  
 5 shall include, but not be limited to applicable City standards, including safety precautions (warning  
 6 signs, barricades, lights) and all applicable zoning and safety codes, construction standards, noise  
 7 regulations, regulations for providing notice to persons that may be affected by such facilities  
 8 construction, and such directives or additional conditions placed on the encroachment permit by the  
 9 Director of Public Works governing the time, place and manner in which facilities may be installed  
 10 in the public rights-of-way, including but not limited to, the following: . . .” What then follows are  
 11 various standards for activities, including hours of operation and requirements that mostly relate to  
 12 construction operations.

13       Subpart (b) requires those working in the public rights-of-way to exercise reasonable care  
 14 and to use commonly accepted methods and devices for preventing accidents. Subpart (c) states that  
 15 the Director of Public Works may require temporary disconnection, relocation or removal of  
 16 facilities in the public right-of-way when “required by the City in exercise of its governmental or  
 17 proprietary powers by reason of traffic conditions, public safety, public rights-of-way construction  
 18 and repair, or any other purpose where the work involved would be aided by the removal and  
 19 relocation of the facilities in the public right-of-way.”

20       These sections reflect the City’s regulation of projects that require an encroachment permit  
 21 on a legitimate time, place and manner basis. This is also reflected in Section 13.18.030, which  
 22 describes the application one must submit in order to obtain an encroachment permit.

23       When Zeleny informed the City that he wished to obtain a film permit he was sent an  
 24 encroachment permit application and an information sheet. Flegel Decl. at 4:14-18, Exh. E. The  
 25 written criteria for determining whether to issue an encroachment permit, including a film permit,  
 26 are found in the permit application and in an informational document provided to applicants. Bertini  
 Depo at 113:15-115:2, Exhibit 35, 125:6-16, Exhibit 36. Both documents require the applicant to

1 comply with City ordinances, which includes Chapter 13.18 of the Municipal Code.

2 Chapter 13.18 of the Municipal Code, the encroachment permit application (with General  
 3 Conditions) and the “Film Production in Menlo Park” document are all content neutral. Their  
 4 requirements are similar to and consistent with the situation described in *Thomas v. City of*  
*5 Chicago*, 534 U.S. 316 (2002). The *Thomas* case involved permit applicants who wished to  
 6 conduct rallies advocating the legalization of marijuana in a public park. *Thomas, supra* at 319-320.  
 7 The court found that the Chicago city ordinance involved regulation of the use of city property in a  
 8 content-neutral manner. Swapping out “Park District” for “City” and “picnicker and soccer-player”  
 9 for “general contractor and filmmaker,” the following language from *Thomas* applies here:

10 The Park District's ordinance does not authorize a licensor to pass judgment on the content  
 11 of speech: None of the grounds for denying a permit has anything to do with what a speaker  
 12 might say. Indeed, the ordinance (unlike the classic censorship scheme) is not even directed  
 13 to communicative activity as such, but rather to all activity conducted in a public park. The  
 14 picnicker and soccer-player, no less than the political activist or parade marshal, must apply  
 15 for a permit if the 50-person limit is to be exceeded. And the object of the permit system (as  
 16 plainly indicated by the permissible grounds for permit denial) is not to exclude  
 17 communication of a particular content, but to coordinate multiple uses of limited space, to  
 18 assure preservation of the park facilities, to prevent uses that are dangerous, unlawful, or  
 19 impermissible under the Park District's rules, and to assure financial accountability for  
 20 damage caused by the event. As the Court of Appeals well put it: "To allow unregulated  
 21 access to all comers could easily reduce rather than enlarge the park's utility as a forum for  
 22 speech." 227 F.3d 921, 924 (CA7 2000). (*Thomas, supra* at 322.)

23 The passage above refers to Chicago's “permissible grounds for permit denial” which  
 24 included: “(8) the proposed use or activity is prohibited by or inconsistent with the classifications  
 25 and uses of the park or part thereof designated pursuant to this chapter . . . ; (9) the use or activity  
 26 intended by the applicant would present an unreasonable danger to the health or safety of the  
 applicant, or other users of the park, of Park District Employees or of the public; . . . (11) the use or  
 activity intended by the applicant is prohibited by law, by this Code and ordinances of the Park  
 District, or by the regulations of the General Superintendent . . . .” These are the same grounds for  
 denial that the City uses in determining whether to issue an encroachment permit, as shown by  
 Section 13.18.110, the encroachment permit application and the City’s information sheet

**H. The Fourth Count of the Complaint Adds Nothing New**

1 Zeleny was asked by interrogatory for all facts supporting the fourth count of his  
 2 Complaint. His response, which is attached as Exhibit I to the Master Declaration, reiterates the  
 3 same claims that have been addressed above, with the added allegation that the City's actions were  
 4 undertaken by "the ultimate decision makers . . . pursuant to an official policy . . . or an established  
 5 custom and practice amounting to an official policy." He claims that there was a lack of  
 6 discernable, concrete standards for permits, despite what is noted above about the film and SEP  
 7 permit processes and despite the fact that he was provided detailed information at each step about  
 8 what the City found deficient or problematic with his applications. In all respects, the fourth count  
 9 of the Complaint adds nothing new and has been addressed above.

10 **I. Defendant Bertini is Entitled to Summary Judgment**

11 Zeleny was asked by interrogatory to list all facts supporting his claims against defendant  
 12 Bertini. He responded that at one or more meetings Bertini informed him that a) a piece of artwork  
 13 involved in his protests was offensive and that if he were to display it he would be arrested and  
 14 charged with "obscenity as to minors," and b) that if he continued his protests with firearms, he  
 15 would be arrested and/or prosecuted. Master Decl. at 4:9-22, Exhibit K. In all other respects,  
 16 Zeleny's responses were non-specific and vague. He echoed his claims against the City and added  
 17 that Bertini actively participated in the City's actions.

18 Zeleny's claim that Bertini threatened to arrest or charge him with "obscenity as to minors"  
 19 is addressed in Section III.B., above. As stated therein, Bertini did no such thing. He simply stated  
 20 that Zeleny's proposed display of "explicit representations of sexual violence" could result in a  
 21 complaint from the parent of a minor who viewed the image(s), in which case a determination  
 22 would have to be made whether Zeleny had violated Penal Code § 313.1.

23 Similarly, Zeleny claims that Bertini's testimony at the City Manager hearing constituted a  
 24 threat to arrest him if he openly carried firearms. But Bertini's testimony that carrying unloaded  
 25 firearms may violate Penal Code §§ 26350 and/or 26400 was likewise not a threat but an  
 26 appropriate expression of opinion based on a fair reading of those statutes. There is no clearly

1 established law that indicates the open carry prohibitions of Penal Code §§ 26350 and 26400 in  
 2 this context or any other are unconstitutional or otherwise invalid. At this very moment the Ninth  
 3 Circuit Court of Appeals is reviewing *en banc* the case of *Young v. Hawaii*, 896 F.3d 1044 (9th  
 4 Cir. 2018), which relates to Hawaii's open carry prohibition and exceptions thereto. Similarly,  
 5 there is no clearly established law that indicates Zeleny's construction of the exemptions to the  
 6 statutory open carry prohibitions are to be construed as he claims. While it appears from the  
 7 Complaint that Zeleny does not seek damages, Bertini would be entitled to qualified immunity.  
 8 See *Saucier v. Katz*, 533 U.S. 194 (2001) and its progeny. Bertini's statements about the potential  
 9 application of Penal Code sections were reasonable and there was no clearly established law that  
 10 was inconsistent with his testimony. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

11 As for Zeleny's claim that Bertini "actively participated" in denying his SEP and film  
 12 permit applications, those claims are also addressed above. The SEP application was properly  
 13 denied because the activities described violated the law and presented significant public safety  
 14 issues. Moreover, because the State owns the median, his rights were not violated since the SEP  
 15 could not have been issued by the City in any event. The film permit was never denied. Rather,  
 16 Zeleny declined to respond to the City's appropriate questions and opted to sue rather than  
 17 complete the process. In addition, Bertini was not a decision maker but simply provided input with  
 18 regard to Zeleny's applications. Bertini Decl. at 3:18-4:2.

19 Finally, to the extent Zeleny seeks injunctive relief against Bertini, the request is moot.  
 20 Bertini has only been sued in his official capacity and has retired. Complaint at Para. 20, Pg. 5;  
 21 Bertini Decl. at 2:5-8. Although no citable Ninth Circuit Court of Appeals decisions could be  
 22 found on this point, the courts in *Jones v. Dovery*, No. 06cv1979, 2009 U.S. Dist. LEXIS 126104,  
 23 at \*30 (S.D. Cal. 2009) and *Valson v. Cate*, 14-cv-01420, 2018 U.S. Dist. LEXIS 112827, at \*8  
 24 (E.D. Cal. 2018) ruled that a request for injunctive relief was moot due to a defendant's retirement.

#### 25 IV. CONCLUSION

26 For the reasons set forth herein, defendants are entitled to summary judgment. The City had  
 no authority to grant plaintiff an SEP for the State-owned median. Moreover, the City had valid

1 time, place and manner grounds for denying the request. Zeleny did not complete the film permit  
2 process such that his as-applied claim is not ripe. The City's permit processes are proper, and  
3 Bertini should not be found liable for simply testifying in a proper, reasonable manner.

4 Date: January 21, 2021

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